

Testimony and Statement for the Record of
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on

Unsolicited Commercial Email

before the Communications Subcommittee of the
Committee on Commerce, Science, and Transportation

U.S. Senate

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My name is Jason Catlett, and I am President and CEO of Junkbusters Corp. I'm grateful for this opportunity to speak with you again.

Junkbusters is a for-profit company whose mission is to free people from unwanted commercial solicitations through media such as email, physical mail, telephone, and faxes. Since our web site launched in 1996, millions of people have turned to us for information, services and software for stopping junk messages, particularly email. I have worked advising government departments and legislators on email and other privacy issues since 1997.

As a technologist--my Ph.D. was in Computer Science--my initial inclination years ago was towards solutions based on technology and administrative processes. But years of practical experience with large numbers of consumers have led me to believe that the essential requirement for the collective protection of privacy is strong rights for the individual. Thanks to the private right of action in the Telephone Consumer Protection Act of 1991, junk faxes are today rare compared to junk email, a result achieved without any vast government bureaucracy, and with little frivolous litigation. In contrast, billions of unwanted email solicitations are sent each day, vexing hundreds of millions of people who feel unable to stop it. This reduces participation in online commerce and erodes the considerable benefits of that responsible email marketing offers to consumers and businesses. What is needed to reverse this harm to consumer confidence in the medium is a law establishing an opt-in standard for commercial email, and a private right of action for recipients and network operators. S. 630 would establish an opt-out

standard and lacks a private right of action, and in my opinion would not improve the situation it addresses.

Before focusing on the specifics of spam, I would like to briefly review the unhappy recent history of online privacy more generally. In the eleven months since I appeared before you in May, the prevailing level of privacy on the Internet appears to have lowered. (Space allows only a few brief examples, for greater detail see <http://www.junkbusters.com/testimony.html> on the Web.)

- * Ever more intrusive collection technologies are being rolled out. Profiling companies are continuing development of their Consumer Profile Exchange technology without any commitment to observe fair information practices in their use of it.

- * Most "privacy policies" offered by companies still offer little privacy, and appear to be getting even worse, according to one longitudinal study by Enonymous.

- * In September Amazon.com substantially weakened its privacy policy.

- * The standards proposed by DoubleClick and a few other online advertising companies and sanctioned by the FTC in July are deplorably low.

- * P3P, which has been billed by some as the pot of privacy gold at the end of the technological rainbow, is now being used by Microsoft as an excuse not to fix the default settings on its next browser that allows tens of millions of web bugs to gather click streams in volumes of billions of clicks per day.

- * At a public workshop run by the Federal Trade Commission in March, the major profiling companies refused to allow people access to their own profiles, or even to provide example profiles.

With this background, and with spam as a regular reminder to consumers of the ease with which personal information can be misused and the difficulty of individual redress, few would be surprised by the conclusion that privacy concerns have severely dampened the growth of ecommerce (certainly not any member of this committee). Over the past year, its spectacular triple digit growth has dropped to such disappointing levels that many online merchants are struggling to break even, finding difficulty attracting investment, or filing for bankruptcy. Yesterday's Wall Street Journal reported that most U.S. households have never made a purchase online. Of consumers who place items in online shopping carts, the majority are still abandoning the transaction before checkout. Online merchants have known for years that the number one concern here is fear for privacy. Furthermore, Forrester Research has found in extensive polling that concerns about privacy are not being assuaged as people gain more years of experience online. In my own discussions

with online marketers whom I know from consulting engagements or from industry conferences, spam is despised as the major cause of damage to consumer confidence and participation.

The failure to control spam is the greatest economic tragedy of the Internet age. Email marketing conducted in a fair, consensual manner offers enormous benefits to consumers and businesses alike, particularly to small businesses who could not afford the expense of traditional media. As email marketing becomes synonymous with spam--a tragedy because this is unnecessary and avoidable-- many consumers are deciding simply not to participate. The right public policy for spam, as with all privacy law, is to give people who participate rights to ensure their personal information is not used unfairly. This promotes both greater participation and better business practices.

Almost no reputable marketer routinely sends email on an opt-out basis. (A few have occasionally done so in error; this is perhaps the reason some companies oppose a private right of action, which would hold them accountable for such mistakes.) It is deplorable that certain trade associations such as the Direct Marketing Association are trying to hold the door open for spamming. H. Robert Wientzen, President and CEO of the DMA addressed members at the organization's 1998 conference with the following words: "Let me begin by recognizing that bulk unsolicited commercial e-mail is not real popular with consumers. And to date, very few of you are employing it. However, we also feel that most of those who push for an opt-in-only regime have very little understanding of the incredibly negative impact it would have on the future use of e-mail as a marketing tool." The DMA continues to indulge in its fantasy of cyberspace as a world of free paper, free printing and postage-due delivery of solicitations, failing to realize that if it had its way, consumers would rebel or flee.

Opt-in is the right policy for marketing by email, and is consistent with successful legislation on marketing by fax. As in the TCPA, the definition of a commercial message should of course be carefully limited to avoid any impact on non-commercial speech, such as speech about religion or politics. The opt-in approach taken in the TCPA for faxes, cellphones and 800 numbers has as its basis the fact that the recipient may incur costs for receiving the unsolicited message. This is also the case for spam, so the opt-in criterion is therefore equally appropriate. The fact that some in some situations recipients appear to incur negligible incremental costs from a specific spam does not change the fundamental fact that spam is postage-due

marketing.

The TCPA's prohibition against telemarketing calls to cellular telephones is not qualified any exemption for situations such as when the carrier offers the first incoming minute free or where the subscriber has excess minutes available for the particular month. That would be as silly as a spam law that said that people whose Internet service plans include unlimited hours are disqualified from monetary damages. Nor is there any exemption in the TCPA for fax-modems where no paper is consumed, a situation closely resembling junk email. Despite the fact that a spam recipient often cannot produce a specific line item from a bill relating to the spam, costs are being incurred by individuals, as well as being diffused among consumers. Of course in many situations the cost can be quantified, such as on certain usage-based tariffs, or when dialing up from a hotel room. In some cases these direct costs exceed the cost of paper for a junk fax or 15 seconds on an 800 number.

Furthermore, spam imposes a hidden tax on all Internet users by increasing network capacity requirements and requiring additional administrative costs at ISPs. I estimate this cost at around one dollar per month for the average subscriber, and billions of dollars per year including institutional buyers of network services. Because ISPs absorb this as a cost of doing business, this expense is not visible to individual consumers, but it is certainly passed on to them. An opt-in policy would reduce this spam-subsidizing tax, lower the cost of Internet access, and stimulate demand for Internet services and ecommerce.

A opt-out policy that allows each spammers one free spam is like permitting shoplifters to steal items until each store requests that they cease thieving. It imposes unfair burdens: in both cases, even people who are not directly victimized incur costs through higher prices. More than a million businesses have Internet access; if even 10% of them sent a single message to half of online US households over a period of five years, the American homes would receive an average of 27 spams per day. The opt-out model is simply inappropriate and unsustainable for the Internet. If opt-out spam were to prevail, email, the killer application of the Internet, would become the application that killed the Internet.

Consider an excerpt from an actual spam and imagine the reaction of a constituent in Alaska reading after downloading it via a toll call. (Of course, it's also important to remember that billions like it may have been sent to millions of people, so focusing on a single specimen is rather like examining a single dead grasshopper at a Senate hearing

on locust plagues, but imagine your reaction multiplied to an appropriate scale.) Here is the spam:

SEX SELLS!!! REALLY WORKS!!!

"Why Pay To Belong To An Adult Web Site When You Can Own Your Own For Less Than The Cost Of The Membership?"

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"Anyone With An Internet Connection Can Own An Adult Web Site For Less Than The Cost Of Their Next Dinner!"

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"No Experience Required! Anyone Can Sell Sex Online In Just Minutes!"

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[extraneous detail deleted]

This message is sent in compliance of the new e-mail bill: SECTION 301. Per Section 301, Paragraph (a)(2)(C) of S. 1618, <http://www.senate.gov/~murkowski/commercialemail/>

Claims of compliance such as the one at the end of this spam have become all too familiar to Internet users, and have been examined in the Wall Street Journal. A key goal of spammers is to gain an appearance of legitimacy, and many have turned to boasting their compliance even with bills that never became law. Some bills from the current congress may already have been used in this manner. The sponsors of these bills may want to consider how they will respond to irate voters who click through to their congressional web sites. When you receive a letter from a constituent angered by the solicitation sent to her teenage son to become a pornographer from the comfort of his own bedroom, how will you answer her question "Is this junk email really obeying your law?" The answer will depend on the kind of bill you pass. As S.630 stands, you would have to answer something like this: "Yes. Every spammer can send you at least one spam, and it's up to you to tell each separate spammer to stop. If they don't, you can't do anything about it yourself, you have to hope that a government agency will do something for you." Is that answer likely to please your constituents? A better answer, which you could give if you pass an amended or different bill, would be "The spammer is lying. My bill made spamming illegal, and it gives you the right to sue the spammer if they break the law."

Of course spammers are less likely to draw the attention of their victims to such a law. But if you pass a weak spam bill, the bill number and your name will surely be cited in vast numbers of junk emails for years

to come. So when you consider the key questions of opt-in vs opt-out and whether to include a private right of action, think of these two alternatives: Do you want your name to be remembered as the lawmaker who said "spamming is wrong"? Or do you want it to become the name that launched a trillion spams?

I appreciate the opportunity to speak before you today. Now I would be pleased to answer your questions.